89- 1585



CASE NO.:

THE SUPREME COURT OF THE UNITED STATES
EIGHTY-NINE TERM

CELIO CASTRO and LARRY FOLTZ,
PETITIONERS,

-versus-

THE UNITED STATES OF AMERICA, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALAN SILBER
Counsel of Record for Petitioners
177 Prince Street
New York, NY 10012
(212) 677-1004

DIANE TOLBERT COVAN
Co-counsel for Petitioners
145 West 93rd Street
New York, NY 10025
(212) 662-5580

QUESTIONS PRESENTED

I. WHEN A LESSOR ILLEGALLY TERMINATES LESSEE'S 99 YEAR LEASE AND THEN TRANSFERS TITLE TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT ASSERTION BY THE UNITED STATES THAT LESSEE HAS NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

II. WHEN A DEBTOR DEFRAUDS CREDITORS IN VIOLATION OF STATE STATUTE BY CONVEYING REAL PROPERTY WHICH IS APPLICABLE TO THE PAYMENT OF A DEBT DUE, AND SUCH CONVEYANCE IS TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT ASSERTION BY THE UNITED STATES THAT THE CREDITORS HAVE NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

III. WHEN A PARTNER CONVEYS THE REAL PROPERTY HE AGREED WITH HIS PARTNERS NOT TO CONVEY, AND SUCH CONVEYANCE IS TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT ASSERTION BY THE UNITED STATES THAT THE PARTNERS HAVE NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

IV. WHEN AN EMPLOYER CONVEYS REAL PROPERTY IN VIOLATION OF THE COVENANTS OF A DEFERRED COMPENSATION AGREEMENT, AND SUCH CONVEYANCE IS TO THE UNITED STATES AS PART OF HIS DRUG CASE PLEA BARGAIN, DOES THE SUBSEQUENT CLAIM BY THE UNITED STATES THAT THE EMPLOYEES HAVE NO INTEREST IN THE REAL PROPERTY AMOUNT TO A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT?

LIST OF PARTIES

THE UNITED STATES OF AMERICA
Plaintiff, Appellee, Respondent

CELIO CASTRO
Defendant, Appellant, Petitioner

LARRY FOLTZ
Defendant, Appellant, Petitioner

JOSEPH A. VALDEZ, JR., AS RECEIVER APPOINTED BY THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA
Defendant

CLARA FERNANDEZ
Defendant

WARREN ELECTRIC OF KEY WEST, INC.
Defendant

FLORIDA KEYS FIRS STATE BANK
Defendant

BOULEVARD BANK
Defendant

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF THE FLORIDA KEYS
Defendant

HARRY KNIGHT, AS TAX COLLECTOR FOR MONROE COUNTY, FLORIDA
Defendant

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CONSTITUTIONS.

Fifth Amendment to the United States Constitution. 20

REFERENCE TO REPORTS OF OPINIONS BELOW

The opinions below have not been published or otherwise officially reported. Copies of all opinions below are contained in the Appendix which accompanies this Petition.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On September 28, 1989, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court. On November 6, 1989, the Eleventh Circuit Court of Appeals denied Petitioners' timely filed Motion for Rehearing. This Petition for Writ of Certiorari to that Court is timely filed 59 days thereafter on this 4th day of January, 1990. Thus, this Petition is timely pursuant to Rule 20 of this Court.

CONSTITUTIONAL PROVISION WHICH THE CASE INVOLVES

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN PERTINENT PART: "... NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION."

STATEMENT OF THE CASE

In 1978, GUSTAVO FERNANDEZ formed Safe Harbor Boat Repairs, Inc. and acquired title to the 23 acres involved herein in the name of that corporation. (R10:311) He then entered into an agreement with the Petitioners, CELIO CASTRO and LARRY FOLTZ, for joint development and shared profit from the land.

The three men retained one of the most sophisticated law firms in Miami to submit their agreement to writing. The law firm assisted the three men in formation of five additional corporations, preparation and recordation of a 99 year lease, and preparation and execution of Deferred Compensation Agreements which forbid conveyance of the land to an outside party. (R12:368-7;

copies are contained in the annexed Appendix.) The desired result was that the Petitioners FOLTZ and CASTRO would be full partners in the land with FERNANDEZ and have all the rights of ownership, fully protected by law, without the present tax liability which would arise if the land was merely deeded to them. (R10:311-14)

In 1980, CASTRO went to prison for possession of marijuana. (R12:411-18) However, although in prison, he retained the rights granted to him by the 99 year lease, the written promise of shared profits, the partnership with FOLTZ and FERNANDEZ, and the Deferred Compensation Agreement.

When it became apparent to FOLTZ that FERNANDEZ was involved with the drug trade, he ceased active involvement with him. However, he retained the rights

granted to him by the written promise of shared profits, the partnership with CASTRO and FERNANDEZ, and the Deferred Compensation Agreement. (R10:311)

To this date, the corporation which held the 99 year lease is in good standing with the Secretary of State of the State of Florida and CASTRO is a stockholder and officer thereof. See, Appendix.

In 1981, FERNANDEZ was arrested in the Northern District of Florida. He was convicted and began serving his sentence. While in prison in 1983, he was indicted in the Middle District of Pennsylvania for eight counts of narcotics trafficking. He faced a possible sentence of 35 years in prison and a $200,000 fine. However, on January 24, 1984, FERNANDEZ and the United States

executed a plea agreement. FERNANDEZ pled guilty to one count of the indictment and assigned all of his interest in the 23 acres of land to the United States. In return, the United States agreed to recommend a five year sentence, concurrent with the sentence already being served, with immediate eligibility for parole, and no fine. The United States also agreed to dismiss the remaining counts of the indictment. (R10:311, Ex. 1)

Although there is no evidence whatsoever that they had any interest in the land, and FERNANDEZ denied that they had any interest, the United States also claimed to have title via judgments of forfeiture of the "beneficial interests" of Antonio Bascaro and Jose Luis Acosta (Northern District of Florida Case nos.

PCR-81-940 and MCR-82-220, respectively).

Prior to the plea agreement between FERNANDEZ and the United States, on January 17, 1984, a State Court action was filed by Appellant CASTRO seeking to protect and enforce his interest in the land. FERNANDEZ was named as a defendant in that action and was served with process on January 20, 1984, prior to entering into the plea agreement with the Government. The United States removed that action to the United States District Court for the Southern District of Florida as Docket no. 84-447-Civ-Eaton, but the case was later remanded to the state Circuit Court. The state Circuit Court had subject matter jurisdiction and personal jurisdiction over the appropriate persons and corporations. On February 25, 1985, it granted Partial

Summary Judgment to CASTRO and FOLTZ finding that the their Deferred Compensation Agreements were legal, valid and binding.

After remand of the case instituted by Petitioners to State Court, because it was unwilling to litigate in the unfamiliar territory of State Court, the United States instituted its own action in the United States District Court for the Southern District of Florida as Docket no. 88-6010 (R1-1-1). Its complaint was styled as an action to quiet title to the 23 acres of land.

Discovery was conducted and various motion were filed. The United States filed a motion for summary judgment (R10-312-1) which was referred to a magistrate for argument and recommendation (R12-387-1). The magistrate entered a report

recommending summary judgment be granted in favor of the United States (R12-401-1), Appellants objected (R12-405-1), the District Court entered its order granting the motion for summary judgment and a judgment in favor of the United States (R14-482-1).

FERNANDEZ didn't steal only from the Appellants. He also stole from the United States on June 12, 1989 when he disappeared with $40,000 of money and an expensive Lincoln Continental, both of which belonged to the United States Government. On that occasion, he had been released from prison and given the money and car in order to set up drug deals for Government agents. He has not been apprehended and the Government's property has not be recovered

FOLTZ and CASTRO appealed from the District Court judgment (R14-495-1) and, on September 28, 1989, the Eleventh Circuit Court of Appeals entered its judgment affirming the District Court, per curiam.

On October 17, 1989, the Appellants filed a timely pro se Motion for Rehearing. The Motion for Rehearing was denied by Order dated November 6, 1989. This timely Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals follows, 59 days later, on this 4th day of January, 1990.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction was had in this case in the first instance pursuant to 28 U.S.C. 1345 because the United States was the Plaintiff.

REASONS FOR GRANTING THE WRIT

The underlying issue here is one of the most ignored but most important facing our nation and judicial system today. In this case, the facts are so clear and extreme that the severity of the situation is obvious.

The property involved is one incredible piece. Essentially, it's a small island, connected to the highway and surrounded by deep water, just north of Key West, Florida. One gorgeous piece of land and someone or several people employed by the United States of America became convinced that the United States just had to own that property, no matter what.

Something like the character, Crockett, in the TV series "Miami Vice" just had to take that beautiful Mazerati from the smugglers, no matter what, these

United States employees had to have this land. In order to get it, they made a deal with the criminal Fernandez for his one-third interest and then sued the Petitioners (and others) in a quiet title action in order to obtain Petitioners' two-thirds interest without compensation of any kind. In the law suit, the word "drugs" was bandied about liberally and on each occasion, the Petitioners, their rights, and the Constitution of the United States were taken less and less seriously. Soon, even Petitioners' own counsel were not taking them or their case seriously. To the point that Petitioners' attorneys failed to argue any of the real issues and failed to even mention the Constitution of the United States. Petitioners fired their counsel during the Appeal and filed a pro se Petition for Re-Hearing to the appellate

court.

The biggest problem seems to be that persons from all walks of life, even those who are officials of the United States Government, have become so intoxicated by the greed which accompanies the drug trade that, when the drug infection has sufficiently spread in any situation, it appears appropriate to disregard even the most basic Constitutional rights of innocent citizens in order to acquire the ripe spoils.

If the United States is allowed to nullify Petitioners' Constitutional rights to their property, or just compensation in exchange therefor, merely because the claim of the United States to the property originated in the unclean hands of a drug smuggler, then we have lost the drug war. Indeed: we will have lost everything.

The Fifth Amendment taking issue was not raised in the District Court or on appeal. It was for the first time argued in the pro se Petition for Re-Hearing in the Eleventh Circuit. However, because it is such a significant matter of general impact and injustice would result, the issue must not be deemed waived. In Re Howell, 731 F.2d 624, 627 (9th Cir. 1984), cert. den. Howell v. State Board of Equalization of Calif., 105 S.Ct. 330, 469 U.S. 933 (1984); Silber v. United States, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962). The Court may even sua sponte notice an issue that has not been raised by any party in any court. United States v. Western P. R. Co., 352 U.S. 59, 1 L.Ed.2d 126, 77 S.Ct. 161 (1956); Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S.313, 28 L.Ed.2d 788, 91

S.Ct. 1434 (1971); Schlesinger v. Councilman, 420 U.S. 738, 43 L.Ed.2d 591, 95 S.Ct. 1300 (1975). It must also be remembered that, until the District Court case herein was concluded, there was no taking; all that existed was a inchoate taking. It was not until the District Court rendered judgment that the taking became complete.

In addition to the Constitutional dimension of the issue, the issue is highly significant because it concerns extremely valuable property. Throughout modern history, it has been recognized that a man's property is sacrosanct, that governments will tend to take property, and that it a great wrong for them to do so.

> A Prince, as I have said before, sooner becomes hated by being rapacious and by interfering with the property and with the women of his

> subjects, than in any other way. From these, therefore, he should abstain. For so long as neither their property nor their honour is touched, the mass of mankind live contentedly, ...

Machiavelli, The Prince, Ch. XIX "That A Prince Should Seek to Escape Contempt and Hatred." This is especially true when the taking is not compelled for the public good and just compensation has not been paid. It matters not that there is a "reason" to take the property. As Machiavelli also noted,

> pretexts for confiscation are never to seek, and he who has once begun to live by rapine always finds reasons for taking what is not his; ... .

Machiavelli, The Prince, Ch. XVII "Of Cruelty and Clemency and Whether It Is

Better to Be Loved or Feared."

It is because this matter is so important, to the rights of the citizenry and well as the continued integrity of a government, that it was included in the Fifth Amendment to the United States Constitution: "... nor shall private property be taken for public use, without just compensation."

The property that the Government took without just compensation from the Petitioners herein is extensive. It includes: (a) the 23 acres of real property; (b) the 99 year lease from Safe Harbor Boat Repairs, Inc. to Safe Harbor Marina, Inc.; (c) the assets of the partnership/joint venture of Fernandez, Foltz and Castro; and (d) the deferred compensation due from Safe Harbor Boat Repairs, Inc. to Foltz and Castro

pursuant to the deferred compensation agreement. Each of these items of property will be dealt with separately, below.

A. The 23 Acres of Land:

The Petitioners' rights to the 23 acres of real property should be protected by Florida's fraudulent conveyances statute. However, the District Court and Magistrate erroneously concluded that Petitioners were claiming that they, as unsecured creditors, have been defrauded by the United States, and therefore, the deed is void. In truth, the Petitioners claim that they have been defrauded by Gustavo Fernandez and by Safe Harbor Boat Repairs, Inc., and therefore, the deed to the United States is void.

The law of fraudulent conveyance is not concerned with whether the transferee has improper motives; its only concern is with the intentions of the transferor:

> [t]o constitute a fraudulent conveyance, there must be a creditor to be defrauded,, a debtor intending fraud, and a conveyance of property which is applicable by law to the payment of the debt due.

Bay View Estates Corp. v. Southerland, 154 So. 894, 900 (1934) (emphasis added). All three of those elements are present here. Appellants Castro and Foltz are creditors to be defrauded. Fernandez clearly intended to defraud them when he conveyed a property worth several million dollars in exchange for $10 and 45 years of his life.

As part of the transaction between Fernandez, Foltz and Castro, Safe Harbor

Boat Repairs, Inc. (of which Fernandez was the only shareholder) gave a 99 year lease to the real property to Safe Harbor Marina, Inc. of which all three men were shareholders and then, later, only Fernandez and Castro were shareholders. Then, in 1982, Fernandez alone, without the consent of the other shareholder, Castro, purported to cancel that lease. This was an illegal cancelation pursuant to Florida law. Without the 99 year lease to the property, Safe Harbor Marina, Inc. had no assets. Florida Statute 607.241 requires a specific procedure when there is to be a "sale, lease, exchange, or other disposition of all, or substantially all, the property and assets of a corporation." The board of directors must adopt a resolution, there must be a meeting and vote of the

shareholders after written notice to all shareholders. Only if the shareholders vote to do so, may the asset or assets be sold, leased, or exchanged. Schwadel v. Uchitel, 455 So.2d 401, 402-03 (3d D.C.A. Fla. 1984). The cancelation of the 99 year lease clearly destroyed the means to accomplish the purpose and object for which Safe Harbor Marina, Inc. was incorporated. Thus, the cancelation without notice to the shareholder Castro was in violation of Fla. Stat. 627.241.

C. The Partnership/Joint Venture:

The United States concedes as undisputed the fact that Fernandez, Foltz and Castro intended to form a partnership. See, Brief of the Appellee United States at 21 in annexed Appendix. There is little difference in Florida law between a partnership and a joint

venture. Often, any distinction becomes completely blurred. Elting Center Corp. v. Diversified Title Corp., 306 So.2d 542 (3d D.C.A. Fla. 1974). After forming this partnership/joint venture intention during 1978 and 1979, the parties employed one of the best, most sophisticated law firms in South Florida and asked them to draw up the necessary paperwork. Unfortunately, the attorneys sought to do more for the clients than was required; they sought to create the equal partnership/joint venture without incurring any present tax liability. It is due to that overreaching by the attorneys that confusion has arisen. However, a partnership or joint venture was, in fact, created. A total of six corporations were formed. One corporation wholly owned by Fernandez

gave a 99 year lease to the real property to a corporation owned by all three partners/joint venturers. Written agreements were entered into which gave them equal rights to the value of the assets. Money was borrowed and mortgages were executed and personally guaranteed. The result of the entire transaction was "an agreement to share in profits and losses and to share assets and liabilities of the business." That alone, is sufficient to comprise a partnership under Florida law.

If the relationship was not a partnership, it was certainly a joint venture. Hyman v. Regenstein, 222 F.2d 545 (3d D.C.A. Fla. 1955); Ellison v. Riddle, 166 So.2d 840 (3d D.C.A. Fla. 1964). It is irrelevant that the device of corporations was used as part of the

joint venture. Granik v. Perry, 418 F.2d 832 (1st D.C.A. Fla. 1969).

A major source of error below was consideration of the Deferred Compensation Agreement alone when that document was only one facet of a complex relationship and transaction which included the 99 year lease and joint personal liability for the payment of mortgages. The parties intended a partnership or joint venture and that intention is what ultimately determines whether a partnership or joint venture was created. Hyman v. Regenstein, 258 F.2d 502 (5th Cir. 1958), cert. den. 79 S.Ct. 589, 359 U.S. 913, 3 L.Ed.2d 575. It is clear that the various corporations were merely mechanical devices for running the partnership/joint venture and that the corporations formed a single

whole with the partnership/joint venture. Thus, looking at a single corporation and a single document has only distorted the matter and caused an unjust result. Fortugno v. Hudson Manure Co., 144 A.2d 207 (Ap. Div. N.J. 1958). This mistake caused the District Court to believe that the Petitioners had not performed under the Deferred Compensation Agreements.

D. The Deferred Compensation:

The District Court found that the Deferred Compensation Agreements "failed as contracts for lack of mutuality." See, Order of March 11, 1987 at 7, in attached Appendix. However, the District Court had no right to rule upon the validity of the Deferred Compensation Agreement because the matter was res judicata and was barred by the doctrine of collateral estoppel.

In 1985, the United States was the sole shareholder of the corporation known as Safe Harbor Boat Repairs, Inc. That corporation was a Defendant in the action known as Celio Castro, et al, v. Safe Harbor Boat Repairs, Inc., et al, Circuit Court of the 16th Judicial Circuit of Florida, Case no. 84-35-CA-17. On February 25, 1985, that court found that each of the Deferred Compensation Agreements "was legal, valid and binding when entered into by and between the parties." That judgment was recorded in the Official Records of Monroe County Florida on February 26, 1985, at Official Record Book 934, Page 1320.

The United States had notice of that action since a date prior to becoming the shareholder of the corporation and the ostensible owner of the land. See, Brief

of the Appellee United States, at page 9. In fact, the United States removed that action to the United States District Court for the Southern District of Florida as Docket no. 84-447-Civ-Eaton, but the case was later remanded to the state Circuit Court. Thud, there is no doubt that the state Circuit Court had subject matter jurisdiction. It also had personal jurisdiction over the corporation Safe Harbor Boat Repairs, Inc. It is only as the shareholder of that corporation and as the successor in interest and title to that corporation that the United States is involved in this matter. The issue here is the same as it was in the state court: whether the Deferred Compensation Agreement was a valid contract when the parties executed it. The issue was fully litigated and

was not only "critical and necessary" to the state court judgment, it was the only issue reached.

It does not matter that the state court suit was initiated by Petitioners against Safe Harbor Boat Repairs, Inc. before it and its property were sold to the United States. It also is irrelevant that this suit is by the United States to quiet title to the property it received from Safe Harbor Boat Repairs, Inc. The issue may not be relitigated and is barred by collateral estoppel. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). It is the corporation that owes the deferred compensation to the Petitioners and when the United States acquired the corporation it acquired that debt also. Rockney v. Blohorn, 877 F.2d 637 (8th

Cir. 1989).

WHEREFORE, PETITIONERS CELIO CASTRO AND LARRY FOLTZ pray this Court grant their Petition for Certiorari to the Eleventh Circuit Court of Appeals.

ALAN SILBER
177 Prince Street
New York, NY 10012
(212) 677-1004